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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO ORTIZ,

Defendant and Appellant.

2d Crim. No. B201362
(Super. Ct. No. BA311910)
(Los Angeles County)

Gerardo Ortiz appeals from the judgment entered following his conviction by a jury of brandishing a firearm (Pen. Code, § 417, subd. (a)(2))¹ and being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) The jury found true an allegation that the latter offense had been committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The jury acquitted appellant of assault with a firearm. (§ 245, subd. (a)(2).) The trial court found true an allegation that appellant had served a prior separate prison term. (§ 667.5, subd. (b).) The court struck the prior and sentenced appellant to prison for five years.

Appellant contends that the trial court erroneously admitted a police officer's rebuttal testimony. In addition, appellant contends that the evidence is insufficient to support his convictions because there is no substantial evidence that he possessed a real

¹ All statutory references are to the Penal Code unless otherwise stated.

firearm rather than a replica. Finally, appellant argues that the evidence is insufficient to support the true finding on the gang enhancement.² We affirm.

Facts

Prosecution Evidence

Just before 2:00 a.m. on August 18, 2006, Laurence Peru parked his car on the street. Appellant drove his car alongside Peru's vehicle and stopped. The two vehicles were two to three feet apart. The driver's side of appellant's car was next to the driver's side of Peru's car, and the driver's window on both vehicles had been rolled all the way down.

Peru had previously seen appellant in the neighborhood. He knew that appellant was a gang member. Appellant said, "Where are you from?" Peru replied, "Well, I live around here." Appellant declared, "My name is 'Tank' from Rascals, and you are not supposed to be putting your car here. You are not supposed to be blocking the streets." Peru responded, "Well these streets don't belong to you." Appellant raised a handgun to the level of his chest and pointed it at Peru, who said, "Okay. All right." Appellant then drove away.

Peru described the handgun as a nine-millimeter "dark colored[]" semi-automatic." Peru was familiar with this firearm, as he had shot a semi-automatic handgun. Peru could not tell whether the firearm was a real gun or a replica.

John Cuenca is a Los Angeles Police Department officer who qualified as an expert on criminal street gangs. His testimony was as follows:

The Rascals is a criminal street gang in Los Angeles. On August 18, 2006, appellant was an active member of the gang. His gang moniker was "Tank." Appellant's confrontation with Peru occurred within the Rascals' gang territory.

Appellant's acts during the confrontation were committed for the benefit of the Rascals. Appellant's question "Where are you from?" is "a standard gang challenge." By identifying himself as a gang member and telling Peru not to park his car on the street,

² In a letter to this court filed on September 12, 2008, appellant withdrew the contention in his opening brief that the trial court had erroneously admitted field identification cards.

appellant was "showing supposed domination over that particular street and ownership of it by this particular gang." The incident would elevate appellant's position within the gang because "he's coming right out and saying who he is and where he's from, knowing quite well that there might be repercussion[s] from it but not seeming to care. It makes him seem a little tougher." The incident would also enhance the gang's reputation by "letting it be known . . . that his gang owns this particular street" and by instilling fear in the community.

Defense Evidence

Appellant presented an alibi defense. His testimony was as follows:

At the time of the incident involving Peru, appellant was at home with his wife. Appellant was a member of the Rascals, and "Tank" was his gang moniker. But he is no longer a gang member. Appellant still associates with his brother, Efren Ortiz (Efren), and his friend, Steve Garcia, who are *former* members of the Rascals.

Rebuttal

In rebuttal, Officer Cuenca opined that Garcia and Efren are *current* members of the Rascals. His opinion was based on a number of factors, including statements by both of them admitting that they were members of the Rascals. The statements were made to Cuenca on January 20, 2006, approximately seven months before appellant's confrontation with Peru. At the time of the statements, Efren and Garcia were under investigation for a gang graffiti incident.

Admission of Cuenca's Rebuttal Testimony

Appellant contends that the trial court erroneously admitted Officer Cuenca's rebuttal testimony that, on January 20, 2006, Garcia and Efren had said they were Rascals gang members. This testimony, appellant argues, was inadmissible hearsay that violated his Sixth Amendment right of confrontation pursuant to *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. " '*Crawford* . . . held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a

prior opportunity for cross-examination.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1007.)

Appellant waived the *Crawford* issue because he failed to raise it below. Appellant's trial counsel merely stated, "I think it's somewhat unfair [to admit the rebuttal testimony] because, if I had the time and I went out and got Steve Garcia in here, I would suspect that his recollection would be quite a bit different." " 'It is, of course, "the general rule" ' - to which we find no exception here - ' "that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." ' [Citation.] There was [not] a 'specific' . . . objection below predicated on the Sixth Amendment's confrontation clause." (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

In any event, appellant's hearsay and *Crawford* claims lack merit. "[A]n out-of-court statement is hearsay only when it is 'offered to prove the truth of the matter stated.' (Evid.Code, § 1200.)" (*People v. Jurado* (2006) 38 Cal.4th 72, 117.) The statements of Garcia and Efren were not hearsay because they were not offered for the truth of the matters stated. Instead, they were offered to show the basis for Officer Cuenca's expert opinion that Garcia and Efren were current Rascals gang members. "It is the longstanding rule in California that experts may rely upon and testify to the sources on which they base their opinions [citation], including [out-of-court statements] of a type reasonably relied upon by professionals in the field. [Citations.] . . . [¶] . . . '*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.' [Citation.]" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; accord, *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427.)

It was a relevant matter whether Garcia and Efren were current, instead of former, gang members. Evidence of their current membership impeached appellant's testimony that Garcia and Efren had left the gang. Because Officer Cuenca was an expert on gangs, the trial court did not err in permitting him to express his opinion on their gang membership and to relate the out-of-court statements upon which he had relied in

forming that opinion. (See *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210 [*Crawford* not violated where, as one of the bases for expert's opinion that defendant was a gang member, expert related conversations with other gang members in which they had identified him as a member of the gang]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464 ["an individual's membership in a criminal street gang is a proper subject for expert testimony"].)

We reject appellant's contention that the trial court abused its discretion by not excluding Garcia's and Efren's admissions of gang membership under Evidence Code section 352.³ Appellant argues that exclusion was required because the probative value of their statements was substantially outweighed by " 'the risk that the jury might improperly consider [the statements] as independent proof of the facts recited therein.' " [Citation.]"

This risk was mitigated by the trial court's instructions. The jury was told that any out-of-court statements related by Officer Cuenca would be inadmissible to prove the truth of the matters stated. The court explained that the jury could "consider it [an out-of-court statement] in the following manner: As something that a witness like this would review and rely on in reaching his opinion."⁴ " 'We presume that jurors understand and follow the court's instructions' [citation] and thus reject the claim the court abused its

³ Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

⁴ The court further elaborated on the matter as follows: "[H]earsay is an out of court statement offered to prove its truth; so we can't allow hearsay statements to come into court for you, the triers of fact, to consider as truth. But we can allow hearsay to come in, not to prove the truth but only to show that this information was considered and relied on by a witness in reaching a certain conclusion." A juror asked: "What if he [Officer Cuenca] was asked a question about, say, a gang member told him something and he was asked to convey that in the courtroom. Is that considered hearsay?" The court responded, "Yes. It is an out of court statement."

discretion under Evidence Code section 352." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Sufficiency of the Evidence: Convictions

Appellant contends that the evidence is insufficient to support his convictions of brandishing a firearm and being a felon in possession of a firearm because there is no substantial evidence that he possessed a real firearm rather than a replica. Peru testified that he could not tell whether the firearm was real or was a replica.

" '[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' ' [Citation.] . . . '[W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

Substantial evidence supports the jury's finding that appellant possessed a real firearm. There is no evidence that the firearm was a replica, and appellant testified that he had never been "in possession of any type of a fake handgun."

Sufficiency of the Evidence: Gang Enhancement

Appellant contends that the evidence is insufficient to support the true finding on the gang enhancement because there is no substantial evidence "that the possession of the weapon itself was for the benefit of the gang and with the intention to promote or assist the criminal conduct of the gang." We disagree. Appellant identified himself as a member of the Rascals, claimed control of the street on the gang's behalf, and backed up that claim with a threat to use deadly force. Officer Cuenca explained that appellant's acts would enhance his status within the gang by showing his toughness. In addition, appellant's acts would benefit the gang by showing its dominance in the area and by instilling fear in the community. Such fear would promote gang criminal conduct by making "people afraid to come forward and report crimes [by gang members] to the police, much less come into court and testify."

Appellant argues that the evidence is insufficient because the jury acquitted him of assault with a firearm. But this acquittal is irrelevant to the validity of the true finding on the gang enhancement. The jury found that appellant had displayed the handgun, since it convicted him of the brandishing offense. Based on the brandishing and appellant's statements to Peru, the jury could have reasonably concluded that he had possessed the firearm for the benefit of the gang with the specific intent to promote criminal conduct by gang members.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Carol H. Rehm, Jr. , Judge
Superior Court County of Los Angeles

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